STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.
Affirming the Kent County Circuit Court, Donald A. Johnston.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

CHRISTOPHER LAMAR HAWKINS,

Defendant-Appellee.
_____/

Supreme Court
No. 120437

Court of Appeals
No. 230839

Kent County Circuit
Court No. 99-122537-FH

BRIEF OF AMICUS CURIAE

THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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COUNTER STATEMENT OF QUESTION PRESENTED

IS EXCLUSION OF EVIDENCE SEIZED IN VIOLATION OF THE SEARCH WARRANT STATUTE THE APPROPRIATE REMEDY WHERE EXCLUSION HAS BEEN CONSISTENTLY APPLIED BY THE COURTS AND WAS THE REMEDY CONTEMPLATED BY THE LEGISLATURE WHICH PROVIDED NO OTHER SPECIFIC PENALTY FOR VIOLATION OF THE STATUTE?

The trial court did not answer this question.

The Court of Appeals did not answer this question.

Amicus Curiae answers "Yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae Criminal Defense Attorneys of Michigan accept and incorporate the Counter-Statement of Material Proceedings and Facts contained in the brief of Defendant-Appellee filed on July 29, 2002.

THE SEARCH WARRANT STATUTE AUTHORIZES A MAGISTRATE TO ISSUE A SEARCH WARRANT ONLY WHEN THE SUPPORTING AFFIDAVIT MEETS CERTAIN CRITERIA. EXCLUSION OF EVIDENCE SEIZED IN VIOLATION OF THE STATUTE IS THE APPROPRIATE REMEDY AS EXCLUSION HAS BEEN CONSISTENTLY APPLIED BY THE COURTS AND WAS THE REMEDY CONTEMPLATED BY THE LEGISLATURE WHICH PROVIDED NO OTHER SPECIFIC PENALTY FOR VIOLATION OF THE STATUTE.

The search warrant statute, MCL 780.653 provides that a magistrate's finding of reasonable or probable cause must be based upon the facts related within the affidavit made before him or her. An affidavit for a search warrant may contain information supplied to the complainant by a named or unnamed informant. When a search warrant is based on information from an unnamed informant, section 3(b) of the statute states that the following information must be provided in the affidavit: "If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with knowledge of the information and either that the unnamed person is credible or that the information is reliable."

Without confirmation that the information of an unnamed informant is credible, or that the information provided is reliable, all the magistrate has to determine whether probable cause exists is a mere allegation by the affiant, and mere allegations are not enough to establish probable cause to search a person's home. The sanctity of a person's home is one of the most protected rights in the Fourth Amendment of the United States Constitution, and the only logical remedy for a violation of that right is exclusion. A warrant based upon a bald assertion, as the warrant in the instant case is a clear violation of both the statute and the Fourth Amendment of the United States Constitution, and exclusion must have been the remedy intended by the Legislature.

The above reasoning has been reaffirmed on numerous occasions by this Court, and exclusion has been the sole remedy provided for a violation of MCL 780.653. For example, in *People v. Sherbine*, 421 Mich 502,512; 364 NW2d 658, 663 (1984),the defendant was convicted of first-degree murder based upon taped telephone conversations obtained pursuant to a search warrant in violation of MCL 780.653. The affiant in that case merely asserted that he interviewed an unnamed informant regarding telephone calls from the defendant to the informant, but does not assert the credibility of the informant. This court ruled that "The statutory violation here is clear. The statute requires proof that the informant who supplied the information be credible. The affidavit here failed to satisfy this requirement. The evidence must therefore be suppressed." *Id.*

In *People v. Sloan,* 450 Mich 160, 169; 538 NW2d 380, 385 (1995), the defendant was involved in an automobile accident which resulted in a fatality. Pursuant to a search warrant, the defendant's blood was tested for alcohol, and he was charged with manslaughter with a motor vehicle. The affiant violated the statute because he received his information from another officer and omitted any indication in the affidavit that the information he presented in the affidavit actually had been supplied by another person. This Court ruled that the blood test results were obtained in clear violation of MCL 780.653 and had to be excluded. In so ruling, this Court stated "[f]or the same reason that that mere conclusion of criminal activity would need further facts and circumstances to enable a magistrate to independently find probable cause, the summary observations in the instant affidavit required further factual support." *Id.*

Additionally, this Court indicated that the exclusion sanction does "'serve[ ] a valid and useful purpose. ("'Before we penalize police error, ... we must consider whether the sanction serves a valid and useful purpose.'"Id. at 388.')." Moreover, excluding evidence obtained in violation of a statute is not a new phenomenon under Michigan law. See *McNitt v. Citco Drilling Co.*, 397 Mich. 384, 393, 245

N.W.2d 18 (1976); *People v. Dixon,* 392 Mich. 691, 222 N.W.2d 749 (1974), and *People v. Weaver*, 74 Mich.App. 53, 253 N.W.2d 359 (1977)." *Id.* at 184.

The facts underlying the basis of the affidavit in the instant case are similar to both the affidavits in *Sloan* and *Sherbine*. Indeed, it is undisputed that the affidavit in this case is in clear violation of MCL 780.653. The *only* logical remedy is exclusion of the evidence seized.

This Court in *People v. Stevens*, 460 Mich 626, 639; 597 NW2d 53, 60 (1999), indicated that "there has to be a causal relationship between the violation and the seizing of the evidence to warrant the sanction of suppression." In the instant case, there is a clear causal relationship between the two. The assertion by the affiant in his affidavit, that he "met with a reliable and credible informant on 11/3/99" is simply a bald assertion without support, and does not meet the standard set forth in MCL 780.653. Without the information from that informant, the magistrate had no probable cause to issue the warrant which led to the seizure of evidence.

Quoting from *Colorado v. Connelly*, 479 US 157, 166; 107 S Ct 515, 93 L Ed2d 473 (1986), the *Stevens* Court reaffirmed the purpose of the exclusionary rule: "to substantially deter future violations of the constitution." *Id* at 640. As both the trial court and Court of Appeals held, the warrant in the instant case was a clear violation of both the Michigan Constitution and the United States Constitution. Those courts were also correct in holding that the evidence obtained under this faulty warrant had to be suppressed.

This Court should uphold its own unequivocal precedent and continue to impose suppression as the remedy for violation of the search warrant statute. Legislative history establishes that the Legislature intended the application of the exclusionary rule in this regard. After this Court's decision in *Sherbine*, the Legislature amended MCL 780.653 as to its requirements but remained silent on the judicially

imposed exclusionary rule and certainly did not indicate that it intended any other remedy besides exclusion for violation of the statute. The *Sloan* Court said:

> In *Sherbine*, we held that evidence obtained specifically in violation of M.C.L. §780.653; M.S.A. §28.1259(3) must be excluded. The Legislature appears to have acquiesced in this particular construction of M.C.L. §780.653; M.S.A. §28.1259(3). **While the Legislature subsequently amended M.C.L.§780.653; M.S.A. §28.1259(3) because it disagreed with portions of our statutory analysis provided in *Sherbine*, it is significant that the Legislature when instituting such amendments did not alter our holding that evidence obtained in violation of the statute must be excluded.** To change the law in that regard would have been an easy and convenient task for the Legislature. Neither the language in the amendments, nor the legislative history pertinent to the amendments provide a basis for concluding that a sanction other than exclusion is appropriate for the violation of M.C.L. §780.653; M.S.A. §28.1259(3). Clearly, the Legislature shares our view that no remedy other than exclusion is as likely to assure the full enforcement of all of the requirements under M.C.L. §780.653; M.S.A. §28.1259(3)--a statute specifically designed by the Legislature to implement the constitutional mandate for probable cause under Const.1963, art. 1, § 11. (emphasis added). 450 Mich at 183.

The Legislator amended the statute after the *Sherbine* case, so that an affidavit based upon information by an unnamed informant would not have to show **both** that the information was reliable and that the informant is credible, but **only** that the information is reliable, **or** the informant is credible. This amendment made it easier for an police to obtain a warrant, but it did not make the remedy for violation of the statute any less stringent. The Legislature's lowering the standards necessary to meet probable cause when the affidavit is based on information obtained by an unnamed informant is all the more reason to impose the strict remedy of exclusion. There should be no excuse for the failure of the police to comply with such a simple standard.

A. UNLIKE THE KNOCK AND ANNOUNCE STATUTE WHICH INCLUDES A FINE OR IMPRISONMENT AS A REMEDY FOR VIOLATION, THE LEGISLATURE MUST HAVE INTENDED EXCLUSION OF EVIDENCE TO BE THE REMEDY FOR VIOLATION OF THE SEARCH WARRANT STATUTE BECAUSE IT PROVIDED FOR NO OTHER REMEDY

Plaintiff-Appellant argues in its brief that in *Stevens,* this court found no intent to impose an exclusionary sanction, even though the police officers were the ones who violated the statute and the exclusionary rule was created to deter police misconduct. Plaintiff-Appellant goes on to argue that in the instant case there was no police misconduct; therefore, exclusion is too harsh of a remedy. *Amicus Curiae* disagrees.

Mr. Hawkins' case can easily be distinguished from *Stevens*. First, the warrant obtained in *Stevens* was clearly sufficient and in no way lacked probable cause. Neither party contested the validity of the search warrant. The problem there was in the execution of the warrant and involved a mere technicality. In *Stevens*, the police purchased narcotics from the defendant's female companion. She led them to the defendant's house where they kept the "stash." After the police determined that the defendant was on probation for a controlled substance conviction, they obtained a warrant and raided his home. The defendant moved to suppress the evidence seized because the officers failed to knock and announce their presence before entering, pursuant to MCL 780.657. In the instant case, there was no probable cause presented to the magistrate to obtain the warrant for the defendant's home. The affidavit was nothing more than a mere assertion that the unnamed informant was credible and both Plaintiff-Appellant and Defendant-Appellee agree that this assertion was not enough to establish probable cause.

Secondly, *Stevens* can be distinguished from this case because this Court in *Stevens* applied the inevitable discovery exception to the exclusionary rule. This Court ruled that "[g]iven that the evidence would have been inevitably discovered, allowing the evidence in does not put the prosecution in any

better position than it would be in had the police adhered to the knock-and-announce requirement." *Stevens* supra. at 642. In the case at bar, there is no indication that the evidence would have been discovered, regardless of the violation of the statute. There was no indication that the information contained in the affidavit was reliable and there was no track record established by the affiant to show that the informant was credible. Other than the unsubstantiated tip, there was no additional information that could implicate the defendant in drug trafficking.

Lastly, the *Stevens* case can be distinguished from the case at hand because MCL 780.657, the knock-and-announce statute at issue in *Stevens,* explicitly imposes a fine for violation. The search warrant statute does not contain any penalty provision. MCL 780.657 provides:

> Any person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000.00 or imprisoned not more than 1 year.

Clearly, if the Legislature intended a remedy other than exclusion, it would have indicated so in the statute. This Court in *Stevens* held that a violation of the knock and announce statute "does not control the execution of a valid search warrant; rather, it only delays entry." *Stevens* at 645. The search warrant statute at issue in the instant case does control the execution of a valid search warrant. Therefore, it is only logical for the Legislature to have intended a greater penalty than a fine or imprisonment.

Many other states which impose fine or imprisonment as an alternate remedy to exclusion indicate such remedy in the statute. For example, in Alabama's probable cause statute Alabama Code 1852, § 43 provides:

> Any person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined on conviction not less

> than $20.00 nor more than $500.00, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.

Moreover, Alaska, Florida, Iowa, and Oklahoma all have statutes which make it a misdemeanor to procure a search warrant maliciously or without probable cause, and impose sanctions under the misdemeanor statutes. If the Michigan Legislature intended any remedy other than exclusion for violation of MCL 780-653, it would have indicated so as it did in the knock-and-announce statute.

B. EVEN IF MICHIGAN WAS TO ADOPT THE "GOOD FAITH EXCEPTION" TO THE EXCLUSIONARY RULE, IT WOULD NOT APPLY IN THIS CASE. NO REASONABLY WELL-TRAINED OFFICER WOULD HAVE RELIED ON THE WARRANT BECAUSE IT WAS SO LACKING IN INDICIA OF PROBABLE CAUSE AS TO RENDER OFFICIAL BELIEF IN ITS EXISTENCE ENTIRELY UNREASONABLE. .

In its brief, Plaintiff-Appellant urges this Court to reconsider its grant of leave in this case and permit the parties to brief and argue the question of whether the "good faith" exception to the exclusionary rule should apply to violations of Article 1, section 11 of the Michigan Constitution. In support of this request, Appellant argues that there was no police misconduct in the instant case, and the officers were acting in good faith in reasonable reliance on a search warrant and therefore, should not be penalized. Appellant bases its argument on *United States v. Leon*, 468 US 897; 104 S Ct 3405. The Court in *Leon* ruled that "the Fourth Amendment exclusionary rule should not be applied to bar the use in the prosecutor's case in chief of evidence obtained by officers acting in reasonable reliance on a

search warrant issued by a detached and neutral magistrate where the warrant was subsequently held to be unconstitutional." *Id.*

In *Leon*, the officers initiated a drug-trafficking investigation by surveillance of the defendant's activities. The police officers then filed an affidavit summarizing their observations and were granted a search warrant. The warrant was later held to be invalid because the information was stale but the United States Supreme Court applied the "good faith" exception to the exclusionary rule and permitted the evidence seized to be used to convict the defendant. Although the Court created an exception to the exclusionary rule, it indicated that the exception only applies where the officer's reliance on the warrant is objectively reasonable. It does not apply where "no reasonably well-trained officer would have relied on the warrant, because it was so lacking in indicia of probative cause as to render official belief in its existence entirely unreasonable." *Id.* at 922.

In the instant case, the affidavit in support of the warrant was so facially deficient that no reasonably well-trained officer should have relied on it. Unlike *Leon,* there was no valid investigation or corroboration of the information obtained from the informant. The officer merely spoke to the informant and made an assertion that the informant was reliable and credible. He made no mention of why he believed the informant was reliable, nor did he establish a track record to show that the informant was credible.

Although police officers are not legal scholars, they are held to some minimal standards. In *Leon*, the court ruled "[t]he objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits." *Id.* at 918 (citing *United States v. Peltier*, 422 US 531, 542; 95 S Ct 2313;2320 (1975)). The standards set forth in MCL 780.653 are very clear and easy to understand.

Any well-trained officer would have known that a mere allegation of credibility is not enough to establish probable cause.

When reviewing courts assess a magistrate's conclusion that probable cause to search existed, such courts apply the standard of review set forth in *People v. Russo*, 439 Mich. 584, 487 N.W.2d 698 (1992), that "a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Id.* at 604. In applying the standard from *Russo*, the courts must specifically focus on facts and circumstances that support the magistrate's probable cause determination. This deference requires "the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id.* at 603, (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)).

Moreover, reviewing courts must ensure that the magistrate's decision is based on actual facts--not merely the conclusions of the affiant. One of the main purposes of the warrant application procedure is to have a neutral and detached magistrate determine whether probable cause exists. This purpose cannot be achieved if the magistrate simply adopts unsupported conclusions of the affiant. Accordingly, at a minimum, a sufficient affidavit must present facts and circumstances on which a magistrate can rely to make an independent probable cause determination. These concepts are well established throughout Michigan case law. *Id.* See *People v. Effelberg*, 220 Mich. 528, 531;190 N.W. 727 (1922), and *People v. Rosborough*, 387 Mich. 183, 199; 195 N.W.2d 255 (1972).

Additionally, in *Aguilar v. Texas,* 378 U.S. 108, 112, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964), the Court held that reviewing courts may consider only those facts that were presented to the magistrate. In *Aguilar*, two Houston police officers applied for, and obtained, a search warrant upon the basis of informant-supplied information. The informant was identified only as a "credible person," a

conclusion that was unsupported by any other allegation or assertion of fact. The balance of the affidavit consisted of conclusory statements that the informant had supplied "reliable information" and that the affiants believed that specified drugs were in a particular location. *Id.* In the instant case, the magistrate was presented with even less information although, as in *Aguilar,* the affidavit here was nothing more than a bald assertion without any supporting facts.

The United States Supreme Court held that the search warrant was invalid and the evidence should have been suppressed. In so holding, the Court developed a two-pronged test to assess whether an affidavit based on hearsay establishes probable cause. The first requirement is that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [evidence was] where he claimed [it was]." *Aguilar*, supra, at 114. Second, the affiant must provide "some of the underlying circumstances from which [he] concluded that the informant, whose identity need not be disclosed ... was 'credible' or his information 'reliable.'" *Id.* The Court concluded that an informant's credibility must be shown by an assertion of facts tending to support a finding of credibility.

Although the two-pronged test was overruled by *Illinois v. Gates*, supra, and the Supreme Court now looks at the "totality of the circumstances" surrounding the affidavit and what was observed and make a common-sense determination of whether probable cause exists, "veracity" and "basis of knowledge" of the informant must still be considered:

> If magistrates are to fulfill their judicial obligation to independently determine that there is probable cause to search, the magistrates cannot give dispositive weight to an officer's conclusory observation or opinion. To reiterate, there must be facts or circumstances that provide a basis for magistrates to conclude that there is probable cause to search; mere affirmance of a conclusory observation is not enough." *Sloan* supra., at 172.

This Court has affirmed this standard in both *Sloan* and *Sherbine*, two cases interpreting MCL 780.653, the statute in question in the instant case. In *Sloan*, the affidavit stated: "appears Robert Leonard Sloan under influence of intoxicating liquor...." *Id.* This court considered this statement to be

> a mere conclusion or opinion of the affiant. The affidavit does not include any facts to support this conclusion or opinion. Without such facts, it would be impossible for the magistrate to have independently concluded that there was probable cause to search. In sum, we hold that the affidavit failed to provide a substantial basis to support a conclusion that probable cause existed. *Id.*

Similarly, in *Sherbine,* this Court stated:

> Conspicuously absent is any allegation, supported or unsupported by the underlying facts, that Bradway is a credible person. The affidavit fails to even reach the level of a bare conclusory statement that Bradway is a 'credible person'. The affidavit does not show that Bradway had given reliable information about the telephone conversations. The affidavit is deficient under the statute, the warrant invalid, and the tape recordings were properly suppressed by the circuit judge. This should not be read to say that a pro forma statement that an informant is a 'credible person' satisfies the statutory requirement. *Sherbine* supra. at 511.

The mere statement in the case at hand, that "Your affiant met with a reliable and credible informant" is simply a pro forma statement, with no support. It is conclusory and does not include any facts to support this conclusion or opinion. The affidavit is clearly deficient and the issuing magistrate wholly abandoned his judicial role in authorizing the warrant. Additionally, no reasonably well-trained officer should have relied on the warrant because it lacked any indicia of probable cause.

Accordingly, even if this Court did accept the Appellant's invitation to consider and adopt the "good faith" exception to the exclusionary rule, under the language and holding of Leon, good faith does not apply in this case.

RELIEF REQUESTED

AMICUS CURIAE, the Criminal Defense Attorneys of Michigan respectfully request that this Honorable Court affirm the decision of the Court of Appeals and reject the Appellant's invitation to consider adoption of the good faith doctrine

Respectfully Submitted,

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